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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 614.

CHARLES L. BAENDER, APPELLANT,

vs.

FRANK BARNET, AS SHERIFF OF ALAMEDA COUNTY, CALIFORNIA, RESPONDENT.

MEMORANDUM BRIEF FOR APPELLANT.

LEVI COOKE,
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The penal provision under which appellant was indicted is Section 169, Criminal Code (35 Stat. L., 1120). That Section reads as follows:

> "(Counterfeiting, etc., dies for coins of United States.) Whoever, without lawful authority, shall make, or cause or procure to be made, or shall willingly aid or assist in making, any die, hub, or mold, or any part thereof, either of steel or plaster, or any other substance whatsoever, in likeness or similitude, as to the design or the inscription thereon, of any die, hub, or mold designated for the coining or making of any of the genuine gold, silver, nickel,

bronze, copper, or other coins of the United States, that have been or hereafter may be coined at the mints of the United States; *or whoever, without lawful authority, shall have in his possession any such die, hub, or mold, or any part thereof,* or shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the United States hereinbefore mentioned, *shall be fined not more than five thousand dollars and imprisoned not more than ten years.*"

This Section of the Criminal Code is a codification of Section 1 of the Act of Feb. 10, 1891 (26 Stat. L., 742). That Section reads as follows:

"That every person who, within the United States or any Territory thereof, makes any die, hub, or mold, either of steel or plaster, or any other substance whatsoever in likeness or similitude, as to the design or the inscription thereon, of any die, hub, or mold designated for the coining or making of any of the genuine gold, silver, nickel, bronze, copper or other coins of the United States that have been or hereafter may be coined at the mints of the United States, or who willingly aids or assists in the making of any such die, hub, or mold, or any part thereof, or who causes or procures to be made any such die, hub or mold, or any part thereof, without authority from the Secretary of the Treasury of the United States or other proper officer, *or who shall have in his possession any such die, hub, or mold with intent to fraudulently or unlawfully use the same,* or who shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the United States hereinbefore mentioned shall, upon conviction thereof, be punished by a fine of not more than five thousand dollars and by imprisonment at hard labor not more than ten years, or both, at the discretion of the court."

Section 341 of the Criminal Code, the Repealing Section, repealed the Act of Feb. 10, 1891, last quoted.

In both Sections, *i. e.,* the Criminal Code Section and the

Section which it replaced, we have italicized the provision, first, in the Criminal Code Section under which appellant was indicted, and, secondly, the provision in the Act of Feb. 10, 1891, which the former replaces.

The Court will note that in the present Criminal Code Section the bare, naked possession of a die, hub, or mold, without lawful authority, is made a crime; but the Court will note that the former provision made such possession unlawful only when it occurred "with intent to fraudulently or unlawfully use the same." It may also be pointed out, in this connection, that Section 169 of the Criminal Code creates four separate states of facts as constituting an offense.

First, the making or causing to be made, without lawful authority, of any die, hub, or mold. Such act obviously can occur only with intention, as it is a positive act requiring volition.

Secondly, willingly aiding or assisting in making any die, hub, or mold. Congress here uses the word "willingly," and the act again is a positive act requiring volition.

The third offense is the mere naked possession, the validity of which as an offense we are concerned with in this case.

The fourth and last offense is the act of permitting a die, hub, or mold to be used for or in aid of counterfeiting. This, likewise, is a positive act requiring volition.

The Committee on Revision, which reported the Criminal Code, expressly and purposely eliminated from this Section the element of intent, fraudulently or unlawfully to use the die, hub, or mold. The report of the Committee in this respect is as follows:

> "In the cases of United States *v.* Keller and others, charged, among other things, with having in their possession dies for counterfeiting the coin of some of the South American republics, the District Court for the Southern District of New York held that to constitute an offense under Section 2 of the Act of Feb.

> 10, 1891, it was not only necessary to show the possession of the dies by the defendants, but also that they had them in possession 'with intent to fraudulently or unlawfully use' them in making counterfeit coin. The Court further points out the doubt which arises as to the construction of the Section because of the arrangement of the language thereof. While the criticism of the Court is directed against Section 2 of that Act, it also applies, in a less degree, to Section 1, which relates to the making of dies, etc., for counterfeiting the coin of the United States. To remove this doubt the Committee has transposed the language in both Sections, and has dropped from each Section the words 'with intent to fraudulently use the same,' and by transposing and repeating the words 'without lawful authority.' The Committee believes that a person who has in his possession dies which may be used in counterfeiting any coin should be required to show that his possession is lawful, and that the Government should not be required to prove that he has them in possession 'with the intent to fraudulently and unlawfully' use them for counterfeiting."
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> See 7 Federal Statutes, Annotated, (Second Edition), 730, *note*.

It is thus patent that Congress meant the Statute to erect an offense against the United States, with the element of intention and, by the words used, even the element of knowledge eliminated. The Court of Appeals in its opinion in this case said: "Congress evidently intended that the unlawful possession of such dies should be sufficient evidence to warrant conviction, unless the accused could explain the possession to the satisfaction of the jury," and likened the provision to that in the Harrison Narcotic Act of Jan. 17, 1914, providing that possession of imported opium should be deemed sufficient evidence to warrant conviction, unless the defendant shall explain the possession to the satisfaction of the jury. This, it is submitted, is an erroneous view, and taking the Committee's report as indicating the object of

the language, we find that the Committee expressed the belief that a mere possessor should be required to show that his possession is lawful. The Act, however, makes the mere possessor a violator of law if he possesses without lawful authority; and ignorant possession, as in this case, is possession within the prohibition of the Act which cannot be proved to be by lawful authority; and the accused has not even the opportunity furnished by the Harrison Narcotic Act to explain his possession to the satisfaction of the jury.

The mere naked possessor, possessing with no knowledge whatever that he has the die, hub, or mold in his possession, is foreclosed to make any explanation to the jury except to show lawful authority. Having possession and failing to show to the jury lawful authority therefor, he is of necessity guilty, even though he was absolutely ignorant that the die, hub, or mold had come into his possession. It is submitted that the Circuit Court of Appeals has read into the Section provisions and meanings not present therein, but has, in fact, read the Section as if it had not been amended, as Congress did amend it in the codification, or by substituting in the present language a part of the entire concept of intent and fraud which Congress eliminated in toto. This Court said in United States *ex rel.* Attorney General *vs.* Delaware and Hudson Company, 213 U. S., 366-414, that it could not in reason be assumed that it is a duty to extend the meaning of a Statute beyond its legal sense, upon the theory that a provision which was expressly excluded was intended to be included. In that case a construction of the commodity clause was being urged, which would have existed if an amendment had been adopted which Congress had expressly rejected. Certainly, this rule of construction applies all the more forcibly to a Statute which, in codification, has had eliminated from its text an express provision. Certainly, at no later time can it be held by the Court that the provision expressly eliminated is to be found present, either in whole or in part, by mere judicial construction and inclusion in the codified provision of that which has been expressly elimi-

nated. It is plain that Congress meant to eliminate knowledge or intention, and did so by clear excision of the prior provision in this regard. Congress left a mere naked prohibition of possession without express lawful authority therefor. And thus a defendant is convicted because his possession without knowledge, and with complete innocence of any wrongful intention, is charged in the language of the Statute; and, if the Statute be good, he is bound to be convicted. As above stated, there is even not the sorry recourse furnished in the Harrison Narcotic Act, to "explain the possession to the satisfaction of the jury." Under the words of the Statute, the defendant is guilty unless, however ignorant of his possession he may have been, he can show lawful authority.

The Circuit Court of Appeals of the Seventh Circuit, in Kaye *vs.* United States, 177 Federal, 147, in considering the Section which this Section at bar displaces, and the question of intent in the several offenses therein created, said:

> "But respecting possession the matter is inherently different. There are many circumstances under which persons might come into possession of counterfeiting molds, either without knowledge of their character, or with such knowledge but without intent to use them fraudulently or unlawfully, as, for instance, the officers who took and held possession of the molds in question. *Mere possession is inherently colorless;* but the making of counterfeiting implements is inherently wrong, or at least was a proper matter for Congress to make wrong, as Congress unmistakably has done."
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> *Loc. cit.*, 150.

For the information of the Court, we print, as an appendix to this brief, the opinion of the Circuit Court of Appeals in Baender *vs.* United States, 260 Federal, 832.

Respectfully submitted,

LEVI COOKE,
Attorney for Appellant.

APPENDIX.

BAENDER

v.

UNITED STATES.

260 Fed., 832.

Before GILBERT, Ross, and HUNT, Circuit Judges.

GILBERT, *Circuit Judge:*

The plaintiff in error pleaded guilty and was sentenced upon an indictment which charged that at a date and place named he did then and there unlawfully, wilfully, knowingly, and feloniously and without lawful authority have in his possession six complete steel dies, each of which was then and there in the likeness and similitude as to the design and the inscription thereon of a die designated for the coining and making of the genuine Indian head design gold coins of the United States, that had theretofore and are now coined at the mints of the United States, and known as and called $5 pieces or half eagles. The plaintiff in error by writ of error seeks to review the judgment, and he contends that the judgment is void for the reason that the indictment fails to allege an offense against the United States, in that it contains no averment that the plaintiff in error had possession of the dies with the intent to defraud, or to use the same in making counterfeit coins. The statute under which the indictment is brought is Act March 4, 1909, c. 321, Sec. 169, 35 Stat., 1120 (Comp. St., Sec. 10339), which provides that:

> "Whoever, without lawful authority, shall have in his possession any such die, hub or mold, or any part thereof, or shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the

United States hereinbefore mentioned, shall be fined," etc.

Act Feb. 10, 1891, c. 127, Sec. 1, 26 Stat., 742, which was in force prior to the enactment of the act of 1909, had denounced as unlawful the possession of the prohibited dies, etc., with intent to fraudulently or unlawfully use the same. In amending the law by the later act, the report of the committee on revision shows that the words "with intent to fraudulently use the same" were "intentionally dropped from the statute"; the committee believing that a person who has in his possession dies which may be used for counterfeiting any coin shall be required to show that his possession is lawful, and that the government should not be required to prove that he has them in his possession with the intent to use them fraudulently and unlawfully for counterfeiting. Congress evidently intended that the unlawful possession of such dies should be sufficient evidence to warrant a conviction, unless the accused could explain the possession to the satisfaction of the jury.

The statute here involved has analogy to Act Jan. 17, 1914, c. 9, 38 Stat., 275, amending Act Feb. 9, 1909, c. 100, 35 Stat., 614 (Comp. St. 1918, Secs. 8800-8801*f*), and providing that possession of imported opium shall be deemed sufficient evidence to warrant conviction, unless the defendant shall explain the possession to the satisfaction of the jury. Under that statute convictions have been sustained on proof of possession; the courts ruling that the statute provides for a presumption of *prima facie* proof of the offense which, while sufficient to satisfy the jury of the guilt of the accused, applying the doctrine of Luria *v.* United States, 231 U. S., 9; 34 Sup. Ct., 10; 58 L. Ed., 101, where it was held that the establishment of a presumption from certain facts prescribes a rule of evidence, and not one of substantive right, and that if the inference is reasonable, and opportunity is given to controvert the presumption, it is not a denial of due process of law. United States *v.* Yee Fing (D. C.)

222 Fed., 154; United States *v.* Ah Hung (D. C.), 243 Fed., 762; Gee Woe *v.* United States, 250 Fed., 428; 162 C. C. A., 498.

It is true that, in all cases in which a specific intent is made part of the offense by the statute creating it, it must be alleged, but in cases where the act includes the intent it is sufficient to charge the offense in the language of the statute, and the intent will be inferred. 22 Cyc., 329; King *v.* Philipps, 6 East, 464; People *v.* Butler, 1 Idaho, 231; People *v.* O'Brien, 96 Cal., 171; 31 Pac., 45; State *v.* McBrayer, 98 N. C., 623; 2 S. E., 755; Commonwealth *v.* Hersey, 2 Allen (Mass.), 173, 180. In the case last cited it was said:

> "When by the common law, or by the provision of a statute, a particular intention is essential to an offense, or a criminal act is attempted, but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegation by proof. On the other hand, if the offense does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved."

In enacting the statute under which this indictment is brought, Congress intended that it should express all the elements of the crime, and that the prosecution, having shown the unlawful possession by the accused, should not be required to prove what was in the latter's mind as to future use of the things so possessed, and that a criminal intent is to be inferred from the unlawful possession.

It is well settled that under the section of the statute which makes unlawful the forging of coins it is unnecessary to allege an intent. United States *v.* Otey (C. C.), 31 Fed., 68; United States *v.* Russell (C. C.), 22 Fed., 390; United States *v.* Peters, 2 Abb. (U. S.), 494; Fed. Cas. No. 16035. But counsel for the plaintiff in error attempts to distinguish the

present case by asserting that the offense which is here charged is not an act of the accused, so that intention may be imputed to it. To this we cannot agree. To have possession is to maintain in physical control, and it implies both will and action on the part of the possessor. Kaye *v.* United States, 177 Fed., 147; 100 C. C. A., 567, is not in point. That case arose under the statute of February 10, 1891.

The plaintiff in error admitted by his plea in the court below the truth of the indictment. We hold that the indictment is sufficient to sustain the judgment. People *v.* White, 34 Cal., 183; Sutton *v.* State, 9 Ohio, 133; Reg. *v.* Harvey, 11 Cox, C. C., 662.

The judgment is affirmed.